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Nos. 87-976, 87-977, 87-979

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

CITY OF WILLCOX, ARIZONA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF EXXON CORPORATION AND CONOCO INC.

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QUESTION PRESENTED

After making specific findings that natural gas pipelines had used their market power to engage in discriminatory practices and had thereby denied consumers the lowest reasonable gas rates, did the Federal Energy Regulatory Commission reasonably interpret the Natural Gas Act and the Natural Gas Policy Act as empowering it to require nondiscriminatory pipeline access as a condition to the authorization of certain transportation services?

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BRIEF IN OPPOSITION OF EXXON CORPORATION AND CONOCO INC.

Intervenors Exxon Corporation ("Exxon") and Conoco Inc. ("Conoco") respectfully request that the Court deny the petitions for writs of certiorari of the Interstate Natural Gas Association of America, Texas Eastern Transmission Corporation, and the City of Willcox, Arizona,

et al. Each of these petitions seeks review of questions concerning the statutory authority of the Federal Energy Regulatory Commission ("FERC" or the "Commission") to require pipelines providing transportation services on a self-implementing basis to do so without discriminating among potential shippers. The questions arise from a decision by the United States Court of Appeals for the District of Columbia Circuit affirming FERC's orders governing such transportation. *See Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987).[1] Exxon and Conoco have joined in a separate petition for a writ of certiorari concerning the court of appeals' ruling that FERC is authorized to abrogate private natural gas contracts. On this question, the court disagreed with FERC as to the scope of the Commission's statutory authority. *See* Petition for Certiorari, *Shell Offshore Inc. v. Associated Gas Distribs.*, No. 87-978 (filed Dec. 14, 1987).[2] For reasons stated in the petition, Exxon and Conoco submit that this question deserves immediate review by this Court. The reasons for such review would become even more compelling were the Court to grant one or more of the petitions that are the subject of this opposition.

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission is charged with implementing the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z (1982), and the Natural Gas Policy

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[1] Exxon and Conoco also oppose the petition filed in this proceeding by Southern California Gas Company concerning the Commission's Optional Expedited Certificate Procedure (No. 87-1091) and refer the Court in this regard to the discussion in the brief of certain other respondents. *See* Respondents' Brief in Opposition, pp. 14-17 (filed Feb. 19, 1988).

[2] This petition was filed jointly by 21 natural gas producers. The list of these petitioners' subsidiaries and affiliates required by Rule 28.1 of the Rules of the Supreme Court is set forth in Appendix A of their petition. Exxon's and Conoco's Rule 28.1 statements are included there and remain accurate.

Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432, 42 U.S.C. 7255 (1982). Read together, these statutes are principally intended "to assure adequate supplies of natural gas at fair prices." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 420 (1986). In the order attacked by Petitioners, the Commission undertook to pursue this objective against a complex background of economic and statutory developments.

In enacting the NGA, Congress sought to protect consumers from the monopoly power of interstate natural gas pipelines through comprehensive, "utility type" regulation over market entry, exit and terms of service. Under the NGA, as construed by this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Commission regulated the sale and transportation of natural gas in interstate commerce, controlling the prices charged by producers to pipelines and by pipelines to their downstream customers. By the early 1970s it had become apparent that the regulatory scheme established under the NGA had broken down. *See Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 330 (1983). In particular, "artificial" NGA controls on wellhead pricing, combined with the emergence of a network of unregulated intrastate pipelines, had led to severe natural gas shortages in various parts of the nation. *See Transcontinental Gas*, 474 U.S. at 420. A natural gas regulatory scheme was needed that would protect customers not only from unfair prices, but also from inadequate or unreliable supplies. *Id.* at 420-21.

In 1978, Congress responded to the gas shortage crisis and the obvious dysfunction of the NGA regime by enacting the Natural Gas Policy Act. The NGPA "dramatically" altered the regulation of natural gas and was intended to be " 'a comprehensive statute to govern future natural gas regulation.' " *Mid-Louisiana*, 463 U.S. at 322, 332 (quoting Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 116

(1980)). This statute reflects Congress' determination that the natural gas industry and its consumers would benefit from the phased removal of wellhead price controls. The development of a workably competitive market was seen as the best means to provide incentives for the discovery of new sources of natural gas, thereby assuring reliable long term supplies.

In enacting the NGPA, Congress made two principal regulatory decisions. The first was to continue the comprehensive regulation of interstate transportation of natural gas, reflecting a congressional judgment that interstate pipelines continue to exercise market power and thus require regulation in the public interest. Second, Congress decided to allow a competitive commodity market for natural gas to develop at the wellhead, thereby "revising [the] comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas*, 474 U.S. at 422.

In light of fundamental changes that thereafter occurred in the natural gas industry, in significant part because of the passage of the NGPA, FERC commenced an intensive investigation of the industry in late 1984. *See* Notice of Proposed Rulemaking, 50 Fed. Reg. 24130 (1985). The result was FERC Order No. 436, 50 Fed. Reg. 42408 (1985), by which the Commission sought to adjust its regulatory scheme to the new realities of the natural gas industry and to fulfill its responsibility "to coordinate the purposes of [the NGA] with the policies established by the NGPA." *See* Order No. 98, 45 Fed. Reg. 53091, 53093 (1980). By this order FERC endeavored to implement the production incentive goals of the NGPA in a fashion consistent with the remaining regulatory goal of the NGA—protection of consumers against the monopoly power of pipelines. The "cornerstone" of Order No. 436 is the requirement that a natural gas pipeline providing transportation under the Commission's

NGA section 7 blanket certification procedures or pursuant to NGPA section 311 do so on a nondiscriminatory basis.[3] Order No. 436, 50 Fed. Reg. at 42424 (30a).[4]

The nondiscriminatory access requirement arose out of FERC's recognition that its transportation regulations must be responsive to the needs of a competitive market at the wellhead, as mandated by the NGPA. The Commission concluded that it must reconcile the two Acts and, in particular, that in exercising its remaining NGA jurisdiction, it must not "thwart the competitive commodity market for gas contemplated by the NGPA." *Id.* at 42420 (15a). In an effort to facilitate development of that competitive market, FERC adopted the nondiscriminatory access condition as a means of affording gas consumers the ability to obtain supplies directly from nearly every producing area in the nation and, con-

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[3] The blanket certification procedures under NGA § 7, 15 U.S.C. § 717f (1982), and the transportation provisions under NGPA § 311, 15 U.S.C. § 3371(a) (1982), constitute FERC's so-called "self-implementing regulations." These provisions allow natural gas transportation without the specific Commission approval and individual certificates of public convenience and necessity generally required by the NGA.

The nondiscriminatory access condition promulgated in Order No. 436 provides:

> [An interstate pipeline or intrastate pipeline] that offers . . . service . . . [under the self-implementing transportation regulations] must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

18 C.F.R. §§ 284.8(b), 284.9(b) (1987); 50 Fed. Reg. at 42493-94.

[4] Parenthetical references following citations to Order No. 436 in this brief are to page numbers in the Appendix submitted herewith, which contains more extensive excerpts from Order No. 436 than appear in the Joint Appendix filed by petitioners ("J.A.").

versely, affording producers direct access to buyers nationwide.

FERC made the following findings as the basis for Order No. 436:

- The natural gas industry that has developed since adoption of the NGPA is characterized by a generally competitive wellhead market for gas as a "separate and distinct economic *commodity*." Order No. 436, 50 Fed. Reg. at 42412-14 (4a-9a) (emphasis in original). Under the NGPA regime, natural gas supplies have increased, and producers, brokers, interstate and intrastate pipelines compete for sales of natural gas. *Id.* at 42419 (14a).
- Although an integrated national transportation network exists, natural gas pipelines retain monopoly power in many areas of the country. *Id.* at 42412, 42413, 42418 (5a, 7a, 13a-14a). Pipelines have exercised this monopoly power over natural gas transportation by generally refusing to provide transportation services to other shippers, particularly those without alternative fuel capability who wish to ship gas in competition with pipeline sales. *Id.* at 42421 (17a).
- This practice has been responsible in significant part for maintaining the delivered price of natural gas at artificially high levels and has prevented the benefits of a competitive wellhead market from reaching consumers. *See id.* at 42421, 42427 (19a, 43a); Order No. 436A, 50 Fed. Reg. 52217, 52229 (1985). Despite a significant surplus supply of natural gas, consumers have been denied means of transporting gas from sellers offering competitive prices. Order No. 436, 50 Fed. Reg. at 42427 (43a). *See also* Notice of Inquiry, 50 Fed. Reg. 3801, 3802 (1985). In sum, "[p]ipeline discrimination in transportation has denied consumers access to gas at the lowest reasonable rates." *Associated Gas*, 824 F.2d at 996 (J.A.

23a). *See also* Order No. 436, 50 Fed. Reg. at 42427 (43a).

- The pipelines' discriminatory practices and the resulting market distortion caused "unnecessarily high energy costs to consumers and a very large loss to the American economy in jobs, production, and net economic efficiency." *Id.* at 42421 (19a). FERC cited Department of Energy estimates that the lack of a nondiscriminatory transportation policy had an adverse economic impact of 9.7 billion dollars annually. *Id.* at 42421 n.100 (19a).

REASONS WHY THE WRITS SHOULD BE DENIED

A. FERC's Nondiscriminatory Access Policy Represents A Reasonable Interpretation Of The NGA And NGPA, And Furthers The Goals Of Both Statutes.

Since Petitioners do not challenge the factual validity or accuracy of the Commission's findings outlined above, *see Associated Gas*, 824 F.2d at 1000 (J.A. 30a), the sole issue before this Court is the reasonableness of FERC's interpretation of the statutory authority that forms the basis for its imposition of the nondiscriminatory access condition. This case thus is governed by the standards set forth by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[5]

This is precisely the type of case contemplated by *Chevron* and related precedents.[6] The statutes FERC is called upon to implement, particularly the NGPA, are

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[5] The court of appeals correctly relied upon *Chevron* in concluding that FERC's judgment that it had the statutory authority to impose the nondiscriminatory access condition was reasonable and therefore controlling. *Associated Gas*, 824 F.2d at 1001, 1003 (J.A. 33a-34a, 37a).

[6] *See, e.g., Falcon Petroleum v. FERC*, 642 F.2d 780, 783 (5th Cir. 1981) (great weight should be afforded to FERC's construction of the NGPA).

technical and complex. The NGPA was the result of one of the most complicated and difficult legislative battles in recent times.[7] In applying the statutes in this instance, FERC reached conclusions that are the result of an exhaustive investigation of the various components of the natural gas industry.[8] The Commission weighed these many competing interests in light of its duty "to live within the letter and spirit of both the NGA and NGPA as Congress has directed [and to] reconcile the two in changing circumstances." Order No. 436, 50 Fed. Reg. at 42420 (15a). These factors mirror those that compelled deference to the agency's decision in *Chevron*.[9]

Petitioner's contention that the nondiscriminatory access condition converts natural gas pipelines into common

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[7] "After nineteen months of bitter controversy, a complicated compromise was enacted as the [NGPA. It] creates an extraordinarily complicated regulatory scheme under which gas producer deregulation will occur in stages over several decades." Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63, 86 (1982) (footnote omitted).

[8] FERC reviewed comments by hundreds of parties representing all aspects of the industry—producers, pipelines, distribution companies, industrial and residential customers, state and federal agencies. The Commission heard from over one hundred parties at public hearings. *See* Order No. 436A, 50 Fed. Reg. at 52219. In the court below, 85 briefs totaling about 2,000 pages were presented. *Associated Gas*, 824 F.2d at 994 (J.A. 18a).

[9] "In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron*, 467 U.S. at 865 (footnotes omitted). *See Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (the "principles of deference have particular force" where "[t]he subject under regulation is technical and complex"); *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 522 (D.C. Cir.), *cert. denied*, 454 U.S. 822 (1981) (deference is especially appropriate when "a complex regulatory statute emerges from a process of difficult legislative gestation").

carriers constitutes a classic "red herring." Contrary to Petitioners' assertions, the court of appeals at no point declared that FERC may regulate natural gas pipelines as "common carriers." Rather, the court carefully examined the nondiscriminatory access condition and determined it to be a reasonable exercise of the Commission's conditioning authority and within its power to prescribe remedies for practices found to be unduly discriminatory. *Associated Gas*, 824 F.2d at 1001 (J.A. 33a-34a). Rhetoric aside, Petitioners' position is no more than an attack on FERC's authority to correct discriminatory practices by pipelines.

The term "common carrier" is not a talisman that can be meaningfully transplanted from the context in which it appears. Rather, this Court consistently has demanded a rigorous examination of a carriage or access provision in light of the purposes and goals of the statute under which the agency has acted. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Petitioners' reliance on *Midwest Video* is misplaced because it wholly disregards the statutory context. Indeed, petitioner Texas Eastern's key quotation from the case pointedly deletes the Court's observation that it was discussing "common-carrier service *in the communications context.*" *Midwest Video*, 440 U.S. at 701 (emphasis added). *See* Petition for Certiorari, *Texas Eastern Transmission Corp. v. FERC*, No. 87-977 (filed Dec. 14, 1987) ("Texas Eastern Petition") at 5-6. The Court's decision in *Midwest Video* was not based on a wooden application of an all-purpose definition of common carriage, but rather on Congress' clearly expressed objective to preserve the journalistic independence and editorial discretion of persons engaged in broadcasting. *See* 440 U.S. at 708. Significantly, as the Court noted in *Midwest Video*, the decision in *Southwestern Cable* affirmed a cable access provision that was deemed necessary to fulfill the agency's statutory objectives and to remedy "a specific perceived evil." *See Midwest Video*, 440 U.S. at 706-07 n.16.

Further, the nondiscriminatory access condition does "not amount to a duty to hold out facilities indifferently for public use." *Id.* Such an affirmative duty is the essence of common carriage in any context. However, the nondiscriminatory access condition is just that—a condition on the certification or authorization of certain transportation services.[10] A pipeline may decide that it does not wish to become a transporter of gas for others but instead pursue the traditional role of gas merchant. A pipeline choosing that course will be regulated in the traditional manner under the NGA. Even if a pipeline wishes to be a transporter, it may choose a traditional NGA section 7 individual certification procedure for each transaction. It is only when the pipeline chooses to operate under the self-implementing regulations of section 7 of the NGA and section 311 of the NGPA, programs created by FERC (not mandated by statute) to aid pipeline transactions, that it becomes subject to the access condition.[11]

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[10] Petitioners' contention that the court of appeals rejected this aspect of FERC's analysis of its statutory authority to adopt the access condition is incorrect. *See, e.g.*, Texas Eastern Petition, at 4-5. The court below expressly characterized the controlling principle here as involving the agency's authority "to subject approval of a set of voluntary transactions to a condition that providers open up the class of permissible users." *Associated Gas*, 824 F.2d at 999 (J.A. 30a). *See also id.* at 1002 (J.A. 35a) (referring to duty to provide nondiscriminatory services as a "conditional one"). The court's comments on FERC's allusion to the "voluntary" character of the access condition appear in the discussion of take-or-pay liabilities. *Id.* at 1024 (J.A. 81a-82a). These comments are in no sense a criticism of the Commission's statutory rationale for imposing the condition, but rather are an aspect of the court's conclusion that FERC had not adequately assessed the likely impact of Order No. 436 on such liabilities.

[11] FERC's judgment in attaching the condition to self-implementing transportation services and not to individual certification is well considered and reasonable. The Commission reasoned that "individual section 7 transportation arrangements can be scrutinized in advance by the Commission on a case-by-case

The Commission also made clear that a pipeline's decision to become a transporter under the self-implementing regulations is not irrevocable. A pipeline is not foreclosed from making a business decision to discontinue self-implementing transportation service, avoid the nondiscriminatory access condition on all subsequent individual transportation transactions, and thus resume its status as a gas merchant. Order No. 436, 50 Fed. Reg. at 42434 (57a). Such flexibility and choice are wholly inconsistent with Petitioners' claim that FERC has imposed common carrier status on natural gas pipelines.

The nondiscriminatory access condition significantly advances the goals of the NGA and the NGPA. FERC is charged with the simultaneous administration of two very different regulatory schemes—(1) the NGA's utility-type market entry, exit and price regulation over the interstate transportation of gas by pipelines, and (2) the NGPA's mandate of a competitive, largely deregulated market for the production and first sale of natural gas.[12] Through the nondiscriminatory access provisions of Order No. 436, FERC has sought to reconcile both schemes, and it has done so reasonably and effectively. Pipeline monopoly power and discriminatory practices were preventing the benefits of a competitive wellhead market from reaching consumers as was intended by Congress. *See* Order No. 436, 50 Fed. Reg. at 42421, 42427 (19a, 43a); Order No. 436A, 50 Fed. Reg. at 52229. Petitioners contend that, even in the face of these uncontested findings, the Commission is powerless to im-

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basis when they are are applied for; whereas, self-implementing transportation authority permits such arrangements to proceed on a 'blanket' or generic basis." Order No. 436, 50 Fed. Reg. at 42435 (61a).

[12] FERC "must administer a pair of statutes that sometimes seem at cross-purposes; it must seek out the elusive optimal mix of competition and regulation." *Maryland People's Counsel v. FERC*, 761 F.2d 780, 789 (D.C. Cir. 1985).

pose any remedy that involves a carriage requirement—even a conditional one. *Associated Gas*, 824 F.2d at 1002 (J.A. 35a). In fact the nondiscriminatory access policy merely requires pipelines to meet the verbatim requirements of NGA sections 4 and 5. The policy is also consistent with the NGPA's goal of a competitive market for natural gas in that it prohibits anticompetitive practices which had the effect of distorting the market for natural gas.

FERC's nondiscriminatory access policy is based firmly in the specific provisions of the NGA and the NGPA. *See* Order No. 436, 50 Fed. Reg. at 42426-29 (38a-50a). Petitioners utterly fail to address these specific grants of authority. The NGA "fairly bristles with concern for undue discrimination." *Associated Gas*, 824 F.2d at 998 (J.A. 26a). Section 4(b) sets forth the Act's general prohibition of "any undue preference or advantage" in the transportation or sale of natural gas.[13] Section 5 expressly obligates FERC to take corrective action upon finding a natural gas practice to be "unduly discriminatory or preferential."[14] As the Commission noted, sec-

[13] NGA § 4(b), 15 U.S.C. § 717c(b) (1982), provides:

> No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

[14] NGA § 5(a), 15 U.S.C. § 717d(a) (1982), provides:

> Whenever the Commmission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that *any* rule, regulation, practice, or

tion 5(a) "is mandatory, not discretionary." Order No. 436, 50 Fed. Reg. at 42422 (21a). It is precisely this obligation that FERC here fulfilled. In addition, FERC relied on its significant authority under sections 7 and 16 of the NGA. Notice of Proopsed Rulemaking, 50 Fed. Reg. at 24134. Section 7(e) provides that FERC may attach "such reasonable terms and conditions as the public convenience and necessity may require" to the certificates authorizing transportation services required under NGA section 7. 15 U.S.C. § 717f(e) (1982). NGA section 16 broadly authorizes FERC to "perform any and all acts, and to prescribe . . . such orders, rules, and regulations as it may find necessary or appropriate to carry out the [NGA's] provisions." 15 U.S.C. § 717o (1982).

Being unable to cite any language in the NGA that would bar FERC from adopting the nondiscriminatory access condition, Petitioners are forced to retreat to an argument based wholly on alleged congressional inaction. But as the court of appeals noted, the legislative history provides "weak—almost invisible—support" for their position. *Associated Gas*, 824 F.2d at 997 (J.A. 26a).[15] Petitioners' argument "turns statutory construction up-

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contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission *shall* determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and *shall* fix the same by order . . . . (emphasis added).

[15] Petitioners' attempt to derive congressional intent from complete statutory silence conflicts with the "cardinal principle of the judicial function of statutory interpretation . . . that courts have no authority to enforce principles gleaned solely from legislative history that has no statutory reference point." *International Bhd. of Elec. Workers, Local Union 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (citing *United States v. American College of Physicians*, 475 U.S. 834 (1986)). *See also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986).

side down" since it is based on the premise that notwithstanding an affirmative grant of specific power, the omission of a grant of general power should be deemed overriding in all circumstances. *Id.* at 998 (J.A. 27a).

The nondiscriminatory access condition is equally well grounded in the NGPA. *See id.* at 1001-03 (J.A. 34a-39a). The access requirement is also a condition to the self-implementing regulations authorizing transportation under NGPA section 311(a), which empowers FERC to authorize transportation by interstate pipelines on behalf of intrastate pipelines and by intrastate pipelines on behalf of interstate pipelines. 15 U.S.C. § 3371(a) (1982). FERC is further authorized to prescribe the "terms and conditions" of transportation authorized by the Commission under section 311. 15 U.S.C. § 3371(c) (1982). The Commission has authorized such transportation, as a general matter, and has attached a number of terms and conditions. *See* 18 C.F.R. §§ 284.101-.126 (1987). Order No. 436 adds the condition that a pipeline choosing to offer such transportation must do so on a nondiscriminatory basis.

Petitioners contend that section 602(b) of the NGPA, 15 U.S.C. § 3432(b) (1982), bars the nondiscriminatory access condition. Section 602(b) provides that a section 311 transporter shall not be subject to regulation "as a common carrier." Although the NGPA does not define "common carrier," and the legislative history on 602(b) is "scant," "[w]hatever else the prohibition regarding 'common carriage' status may do, it does not sweep so broadly as to license unduly discriminatory rates or practices." Order No. 436, 50 Fed. Reg. at 42429 (50a). It would be counter to the purposes of the NGA and NGPA to read section 602(b) to preclude Commission action to ban discriminatory practices based on specific findings that such practices were seriously distorting the market and preventing consumers from receiving the lowest reasonable rates for natural gas. On the other

hand, the nondiscriminatory access condition is consistent with the NGPA's general goals and with sections 311 and 602 specifically.

The available legislative history, H.R. Rep. No. 543, 95th Cong., 1st Sess. 45 (1977), indicates a congressional intent to encourage pipelines, particularly intrastate pipelines, to engage in section 311 transportation by protecting such pipelines from laws, state and federal, under which they might be deemed common carriers based solely on their participation in section 311 authorized transportation. There was no suggestion that section 602 was intended to limit the Commission's power to prevent discriminatory practices.

The court of appeals concluded not only that FERC's interpretation of the scope of section 602 was reasonable, but also that the pipelines' contentions as to the meaning of the provision were doubtful. In these circumstances, the court was bound under *Chevron* to uphold the Commission. *Associated Gas*, 824 F.2d at 1003 (J.A. 37a).

B. Petitioners Rely On A False Conflict.

Petitioners posit a supposed conflict between the decision of the D.C. Circuit below and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and decisions of certain courts of appeals reviewing actions of the Federal Power Commission ("FPC"). Upon analysis, it is apparent that no conflict exists. *See Associated Gas*, 824 F.2d at 998-1000 (J.A. 27a-32a).

Otter Tail did not involve judicial review of an FPC decision, much less an FPC decision containing specific findings of discriminatory practices and related remedial provisions. Rather, the case concerned the question, presented abstractly in an antitrust action, whether the FPC was empowered to compel the wheeling of electric power under the Federal Power Act. The FPC subsequently stated that if the practices of power companies are found

to be discriminatory and unduly preferential, *Otter Tail* would not prevent the FPC from ordering that the discrimination be eliminated. *Boston Edison Co.*, 56 FPC 3414, 3426 (1976) (notwithstanding *Otter Tail*, "if Edison were to discriminate in its offerings of wheeling service . . . , the Commission has the authority . . . to order the elimination of such discrimination"), *remanded on other grounds sub nom. Town of Norwood v. FERC*, 587 F.2d 1306 (D.C. Cir. 1978); *New England Power Pool Agreement*, 56 FPC 1562, 1585 (1976), *aff'd sub nom. Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978). Similarly, in the Federal Power Act cases from the courts of appeals cited by Petitioners, the FPC had not made findings of discriminatory conduct. *See Florida Power & Light Co. v. FERC*, 660 F.2d 668, 677-78 (5th Cir. 1981); *Richmond Power & Light v. FERC*, 574 F.2d 610, 623 (D.C. Cir. 1978).

Even if the Federal Power Act cases were squarely in point on their facts, it would be error to rely on these authorities in the present case because of the differentiating effect of the NGPA. It is true that courts have long tended to equate the NGA and the Federal Power Act and have cited authorities arising under one statute in construing comparable provisions in the other. *See, e.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 349-51 (1956). However, since adoption of the NGPA, it is no longer appropriate to do so indiscriminately.

The NGPA represented a dramatic revision of the natural gas regulatory regime. *See Transcontinental Gas*, 474 U.S. at 420-22; *Mid-Louisiana*, 463 U.S. at 322. FERC must now reconcile the two Acts and adapt its enforcement of NGA provisions to harmonize with the goals Congress sought to achieve in enacting the NGPA. *See Maryland People's Counsel v. FERC*, 761 F.2d 780, 789 (D.C. Cir. 1985); Order No. 23, 44 Fed. Reg. 16895-96 (1979) (NGPA "mandates a new legislative frame-

work for the regulation of the natural gas industry. . . . As such, the [NGPA] . . . limits, replaces or supersedes the application of the [NGA], and this Commission's authority and responsibility thereunder" (footnotes omitted)). FERC's powers to address and seek to eliminate discriminatory practices under the NGA must obviously be exercised in light of the objectives of the entire regulatory scheme, including the congressional purpose evidenced in the NGPA to assure consumers access to competitively priced natural gas. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967) (courts should take into account later statutes in construing general provisions of earlier statutes in an evolving regulatory scheme).

To the extent that the NGPA has materially altered the foundations of FERC's authority, cases arising under the Federal Power Act must be applied with great care in the natural gas context. There may be cases in which the NGPA will have no impact on the application of NGA provisions. However, where Congress' goals reflected in the NGPA have a clear bearing on the exercise of FERC's NGA powers, as they do in this case, electricity authorities are simply inapt.[16]

* * * *

Although properly deferential to FERC's conclusion that it had statutory authority to impose a nondiscriminatory access remedy (*see* pp. 7-15 *supra*), the D.C. Circuit arbitrarily rejected FERC's conclusion that it was not empowered to abrogate so-called "take-or-pay" provisions

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[16] In *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985), the D.C. Circuit emphasized the objectives of the NGPA as the basis for directing FERC to consider on remand whether it should not require nondiscriminatory pipeline access as a means of assuring that the benefits of competition at the wellhead will be enjoyed by local distribution companies and natural gas customers. The opinion in that case explicitly foreshadowed the court of appeals' decision in the present proceeding. *Id.* at 789 n.19. *See Associated Gas*, 824 F.2d at 1000 (J.A. 31a-32a).

in producer-pipeline gas contracts. This ruling flies in the face of Congress' clear decision to deregulate most gas sales at the wellhead, and the lower court's declarations on this issue will lead to immediate and significant disruption of long-standing contracts, transportation arrangements and consumer supplies, as well as years of needless litigation and uncertainty. Exxon and Conoco have therefore separately petitioned this Court for a writ of certiorari on this issue (*see* p. 2 & n.2 *supra*), and they respectfully submit that irrespective of any other issues raised by the *Associated Gas* opinion, the D.C. Circuit's manifest error on the contract-abrogation question warrants immediate correction.

Prompt review of that issue would become even more essential should this Court decide to review the nondiscriminatory access issue. Both FERC and the D.C. Circuit held that the nondiscriminatory access condition could not be considered separately from the contract abrogation issue. In Order No. 436, FERC concluded that before adopting the nondiscriminatory access policy as a remedy for the pipelines' NGA section 5 violations, it was necessary to consider other "inextricably related" issues, including the question whether as part of that policy, take-or-pay contracts should be abrogated. Order No. 436, 50 Fed. Reg. at 42422 (23a). The court of appeals similarly found that "[t]he parts of Order No. 436 are interdependent." *Associated Gas*, 824 F.2d at 1044 (J.A. 124a). Exxon and Conoco respectfully submit that this Court likewise should not consider whether FERC is statutorily empowered to impose a nondiscriminatory access remedy on pipelines without also determining whether FERC is authorized to spread the burden of that remedy to innocent bystanders (*i.e.*, producers) by absolving pipelines of their obligation to fulfill critical terms in privately-negotiated gas purchase contracts.

Take-or-pay provisions typically give pipelines long-term exclusive rights to the production of specified wells

or acreage. In return, the pipelines are required "either to purchase a specified percentage of the producer's deliverable gas [for those wells or acreage] or to make 'prepayments' for that percentage anyway" with the option of taking the gas later at no further cost. *Id.* at 1021 (J.A. 75a). Take-or-pay provisions have long been common in the industry and were found to be particularly useful during the 1977-1982 gas shortages when pipelines sought to ensure reliable supplies by signing long-term contracts at the maximum prices allowed by law. When the shortages abated and gas prices fell dramatically, some pipelines managed to avoid the burdens of the higher-priced take-or-pay provisions by adjusting purchasing practices or by renegotiating their contracts. Other pipelines, however, argued that even though Order No. 436 was intended to correct their discriminatory practices (*see* pp. 4-7 *supra*), FERC should include in its order provisions relieving pipelines from the costly take-or-pay provisions they had voluntarily included in their gas purchase contracts.

FERC concluded that it lacked statutory authority to take such action, *see* Order No. 436, 50 Fed. Reg. at 42423-24, 42433 (27a-28a, 55a-57a), and it therefore unequivocally declined "by essentially a stroke of the pen, to void thousands of gas purchase agreements nationwide and to declare worthless some $7 billion worth of contract damage claims." [17] *Id.* at 42423 (27a). On review, however, the D.C. Circuit declared that the relevant statutes pose "no barrier" to contract abrogation. *Associated Gas*, 824 F.2d at 1030 (J.A. 94a). In so ruling the court failed to acknowledge "that considerable weight should be accorded to [FERC's] construction of [the] statutory scheme," and impermissibly "substitute[d] its own [stat-

[17] FERC also cited policy grounds, concluding that "conditioning [producer] access [to pipelines upon the waiver of contract rights] would run completely counter to the whole idea of opening up the transmission grid on a non-discriminatory basis." Order No. 436, 50 Fed. Reg. at 42434 (57a).

utory] construction . . . for [the] reasonable interpretation made by" FERC. *Chevron*, 467 U.S. at 844.[18]

While FERC's view should have been upheld as "one that Congress would have sanctioned," the same cannot be said of the D.C. Circuit's analysis. *Chevron*, 467 U.S. at 845 (citations omitted). A primary purpose of the NGPA was "to supplant [FERC's] authority to establish rates for the [wellhead] market." *Mid-Louisiana*, 463 U.S. at 331. But the D.C. Circuit's alternative statutory construction transgresses this explicit congressional intent. Indeed, what the D.C. Circuit has countenanced is direct FERC intervention on a rate issue—*i.e.* a perceived "discrepancy between the average cost of gas that pipelines have under [long-term take-or-pay] contract[s] and the much lower price of gas now available at the wellhead." *Associated Gas*, 824 F.2d at 1021 (J.A. 76a).

The D.C. Circuit found contract-abrogation authority in NGA section 5, 15 U.S.C. § 717d (1982). *See Associated Gas*, 824 F.2d at 1027-28 (J.A. 89a-91a). By its own terms, however, section 5 comes into play only upon a determination that a contract provision is "unjust [or] unreasonable." 15 U.S.C. § 717d(a) (1982). In the NGPA, Congress stated directly that such determinations may *not* be based on price terms,[19] and since pricing was the sole ground for the D.C. Circuit's funding of section 5 contract-abrogation authority,[20] the analysis

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[18] In an explicit effort to be "responsive to the [D.C. Circuit's] concerns . . . regarding pipeline take-or-pay problems," FERC has adopted interim regulations now in effect which exercise a purported contract-abrogation authority by requiring producers to offer pipelines credits against any take-or-pay liability. *See* Order No. 500, 52 Fed. Reg. 30334 (1987).

[19] *See* NGPA § 601(b)(1)(A), 15 U.S.C. § 3431(b)(1)(A) (1982) (except in circumstances not relevant here, pricing provisions in producer-pipeline contracts "shall be deemed to be just and reasonable" for purposes of NGA § 5).

[20] The court of appeals explicitly conceded that even the most onerous take-or-pay provisions were not *per se* unreasonable. *See Associated Gas*, 824 F.2d at 1021 (J.A. 75a).

is patently defective. The court of appeals identified no other statutory underpinning for its view,[21] and it therefore should not have disturbed FERC's well-reasoned conclusion that the relevant statutes did not provide contract-abrogation authority.

CONCLUSION

For all of the foregoing reasons, the petitions for certiorari in Case Nos. 87-976, 87-977 and 87-979 should be denied.

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[21] The court of appeals also indicated that FERC could "condition producer access" to pipelines by requiring producers to "cooperat[e] in solving" the purported take-or-pay pricing problems. *Id.* at 1028 (J.A. 91a). But the court cited no statutory authorization for such conditioning. Pricing may not be the basis for FERC's utilization of NGA § 7 conditioning authority. *See* NGPA § 601(c)(1), 15 U.S.C. § 3431(c)(1) (1982) (FERC "may not deny, or condition the grant of, any certificate" on the basis of price terms deemed "just and reasonable" under NGPA § 601). And even if such authority did exist under the NGA, it may not be applied to non-jurisdictional gas contracts. *See Pennzoil Co. v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The NGPA does not grant FERC authority to modify contract terms. *See id.* at 374-75.